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No. 87-741

SUPREME COURT OF THE UNITED STATES

October Term 1987

JOSEPH WILLIAM "BILLY" DOWNS - Petitioner

versus

COMMONWEALTH OF KENTUCKY - - Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the trial court properly allow the Commonwealth to introduce the out-of-court statements of Freddy and Danny Thompson after they refused to testify, where such refusal was procured by the petitioner?

II. Did the trial court's application of KRS 29A.040, providing that a list of registered voters shall be used or included in the jury pool, constitute a denial of petitioner's right to a jury drawn from a source fairly representative of the community?

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OPINION BELOW

The Opinion of the Supreme Court of Kentucky is correctly set forth in slip form in the petitioner's Appendix to his Petition.

JURISDICTION

The jurisdictional facts presented by the petitioner are correct. However, respondent affirmatively states this Court lacks jurisdiction to consider petitioner's argument that a waiver of dual representation should have been secured since this claim was never presented by petitioner to the Supreme Court of Kentucky. 28 U.S.C. §1257(3); Rule of the Supreme Court of the United States 21.1(h).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner correctly states the constitutional provisions involved.

COUNTERSTATEMENT OF THE CASE

The petitioner, Joseph William "Billy" Downs, was found guilty following a trial by jury in the Nelson Circuit Court of three counts of Knowingly

Receiving Stolen Property, one count of Obscuring the Identity of a Machine and one count of Trafficking in Stolen Vehicle Parts. Petitioner was however, acquitted on one count of Obscuring the Identity of a Machine. Following the jury's verdict on the primary charges the jury then found petitioner guilty of being a First Degree Persistent Felony Offender and recommended enhanced sentences of ten years on each of the five counts. The trial court, upon the jury's recommendations, thereafter finally sentenced the petitioner to a total of twenty years imprisonment.

The Supreme Court of Kentucky affirmed petitioner's conviction on June 11, 1987.

COUNTERSTATEMENT OF THE FACTS

Acting on an anonymous tip, police conducted a search of the Danny Thompson farm in Nelson County, Kentucky in February, 1985 (T.E. 242). In a metal building on the farm, police officers found a stolen 1979 maroon Ford pickup truck that was in the process of being stripped and its identity obscured (T.E. 250-251). A new Massey-Ferguson four wheel drive tractor that had been stolen from the Langley Implement Company of Elizabethtown, Kentucky was found in a wooded area behind Thompson's barn (T.E. 252-253). About fifteen vehicle frames and ten to twelve vehicle doors which had their identification numbers removed were also found. Altogether, the physical evidence indicated that approximately twenty-five vehicles had been

disassembled on the Thompson farm (T.E. 296-297).

Danny Thompson was having financial difficulties when petitioner approached him wanting to store a grain truck on his farm for $100.00 a week. Three or four weeks later a John Deere tractor was brought onto the farm. Thompson was suspicious by this time, but petitioner promised to give Thompson $100.00 for every vehicle brought onto the farm. After a few other vehicles had arrived, petitioner asked Danny Thompson and his brother, Freddy, to begin helping him strip the vehicles (T.E. 157-160). Freddy Thompson told petitioner he was afraid they would be caught; petitioner vowed to "slack up." After about three weeks, petitioner brought in more

vehicles, and not long after that the police arrived (T.E. 223-224).

At trial, petitioner employed a two-prong defense: (1) Keep potential Commonwealth witnesses off the stand by encouraging or inducing them to plead the Fifth Amendment; and (2) Discredit any witnesses who testify for the Commonwealth by arguing that a "deal" was made to give testimony in return for favorable treatment by the Commonwealth.

Petitioner went to the Thompson brothers and asked them to see his trial counsel, the Honorable John Douglas Hubbard. He apparently suggested that they should have Mr. Hubbard represent them. (Transcript of March 5, 1986, p.xlxx). The Thompsons employed petitioner's trial counsel to represent them on the charges they faced in this

matter. Petitioner's counsel agreed to defend them conditioned upon their "promise," "representation," and "assurance" that they "would not testify against Billy at trial" (T.E. 125-126; Transcript of March 5, 1986, pp. xxxvi, xl, xliii).

Danny and Freddy Thompson testified extensively before the April 17, 1985 Grand Jury. Consequently, they were indicted by the Grand Jury and entered pleas of guilty to those charges. Thereafter, they were subpoenaed to testify at trial. When Danny Thompson was called by the Commonwealth, petitioner's counsel approached the bench and stated: "Your Honor, I represent both Danny and Freddy Thompson . . . and I now want to make it known to the Court that

they will take the Fifth Amendment" (T.E. 118). When the Commonwealth attempted to have Danny Thompson sworn, counsel responded: "He doesn't have to be sworn. I'm his attorney and I say he's taking the Fifth" (T.E. 119). Freddy Thompson intended to testify until advised by petitioner's counsel not to testify (Transcript of March 5, 1986, p. xlii).

Following an in-chambers conference, the trial court ruled that the Thompsons had no right to invoke the Fifth Amendment because they had already pled guilty and had been finally sentenced on charges arising out of this case. Additionally, the Thompsons had already voluntarily testified at length before the Grand Jury with respect to the charges for which petitioner was

subsequently indicted. The trial court therefore ruled that the Thompsons could be called to the stand and that the Commonwealth could ask them the same questions they had been asked in the Grand Jury proceedings and in police interviews. Such questioning would lay a foundation for introducing those statements in the event they continued to answer questions despite the Court's order that they do so. When the Thompsons persisted in their refusal to testify, the Court sentenced them to jail outside the presence of the jury (T.E. 133-135, 149-152).

The next witness to be stifled was Alex Montgomery of Campbellsville, Kentucky. Petitioner had taken the stolen John Deere tractor to Mr. Montgomery's car dealership and traded it

in on a used Buick Riviera. The police, acting on information received from the Thompsons, John Metcalf, and Charles Blanford, went to Campbellsville and recovered the tractor from Montgomery.

Montgomery had given police an eight page statement detailing the transaction with petitioner. Moreover, on the day he was to testify at trial, his attorney, the Honorable Phillip George, advised the trial court that Mr. Montgomery would invoke the Fifth Amendment if called to the stand. It appeared that Mr. Montgomery had received multiple telephone calls from petitioner the preceding weekend urging him to talk to petitioner's counsel. Finally, Mr. Montgomery did call petitioner's counsel and as a result of that conversation he became afraid his testimony could lead to

him being charged with mail fraud. (T.E. 183-188).

Having been frustrated in its efforts to prove the details of petitioner's disposition of the John Deere tractor through Mr. Montgomery, the Commonwealth subpoenaed Mr. Curtis Bush. Mr.Bush was an employee of Mr. Montgomery whom petitioner initially approached with the offer to trade the tractor in for the Riveria. Mr. Bush had deferred that decision to Mr. Montgomery since accepting tractors as trade-ins was outside his authority. Bush had likewise given a statement to police. When he appeared in response to the subpoena, he, too, claimed the Fifth Amendment.

Although Mr. Bush was independently represented, petitioner's counsel joined in the argument that he should not be

compelled to testify. The Commonwealth's position was that Mr. Bush had no role in the trade beyond referring the matter to his superior, but Mr. Bush eventually signed an affidavit which the trial court ordered sealed and which satisfied the court that a valid Fifth Amendment issue had been raised. (T.E. 377-384, 435).

Petitioner's second line of defense was to attack the credibility of any witness who had contact with him by alleging that "deals" had been made by the Commonwealth to obtain testimony against petitioner. That line of attack was pursued in petitioner's cross-examination of Mr. Blanford and Mr. Metcalf, the only two of the original six witnesses having had dealings with petitioner who were not induced to take the Fifth Amendment. (T.E. 336, 359).

Additional facts shall be developed, as necessary, in the argument section of this brief.

ARGUMENT

I.

THE TRIAL COURT PROPERLY ALLOWED THE COMMONWEALTH TO INTRODUCE THE OUT-OF-COURT STATEMENTS OF FREDDY AND DANNY THOMPSON, AFTER THEY REFUSED TO TESTIFY, SINCE THEIR REFUSAL WAS PROCURED BY THE PETITIONER.

The law has long recognized that a party will not be heard to complain about a problem which he has voluntarily created. Thus, in Motes v. United States, 178 U.S. 458 at 472, (1900), Justice Harlan, quoting from Reynolds v. United States, said:

> "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if

> he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

The principle recognized some ninety years ago in Motes is just as applicable today in this case.

Douglas v. Alabama, 380 U.S. 415, (1965) presents bright-line principles of law which interpret the confrontation clause. The petitioner's inability in that case to cross-examine an accomplice about a confession, which was read to the jury by the prosecutor, constituted a deprivation of the right of confrontation found in the Sixth Amendment made applicable to the states by the Fourteenth Amendment. In contrast to the case at bar, there was no indication that

the Petitioner in Douglas had in any manner procured the slience about which he complained. Douglas, supra at 420. In this case, however, the record fully reflects that the Thompsons' refusal to answer was procured by the petitioner himself, acting through his attorney.

Petitioner suggested that the Thompsons consult with his attorney regarding the charges against them. Petitioner's counsel agreed to represent the Thompsons only upon their "promise," "representation," and "assurance" that they would not testify against petitioner at trial. The record clearly reflects that the constitutional privilege was not asserted by Danny and Freddy Thompson personally, but by the attorney for petitioner, who announced to the court

that he conveniently represented the Thompsons as well.

The Thompsons' refusal to testify was obviously procured by the petitioner, acting through his attorney. The unfairness which amounts to a denial of the right of confrontation is the inability of an accused to face his accuser and challenge the accusation. Douglas v. Alabama, supra, at 419. However, no unfairness occurs in a case such as this where the denial is brought about by the accused himself in furtherance of his own interests at trial. United States v. Mayes, 512 F.2d 637 (6th Cir. 1975), cert. denied 442 U.S. 1008 (1975). (Defendant's attorney also "represented" a witness who asserted Fifth Amendment privilege.)

The hearsay statements of the Thompsons were properly admitted by the trial court since the Grand Jury testimony and statements to police possessed more than "adequate indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 66 (1980). The Thompsons had been questioned by the police on two separate dates. They were subsequently questioned at length, under oath, and before the Grand Jury. They were obviously aware when testifying before the Grand Jury, that what they said would be closely scrutinized. Their version of several events was corroborated through information obtained from other witnesses, i.e., John Metcalf, Charles Blanford, Alex Montgomery, Curtis Bush and Don Ingram. Further, the vehicles they described which petitioner had

disposed of were, in fact, found where they said they could be. There were more than adequate indicia of reliability to justify admission of the Thompsons' heresay statements once Petitioner procured the Thompsons' silence.

The conduct of petitioner's defense counsel, in asserting the privilege, the result of which petitioner now complains, was obviously aimed at protecting the accused and stifling what would have been obviously damaging testimony. Having endeavored, through his attorney, to keep the Thompsons silent at trial, petitioner should not be heard now to complain that he was denied his confrontation rights since he was the moving force behind the Thompsons' silence at trial.

In addition to the confrontation issue, petitioner also raises the issue

that his conviction should be set aside because there was no waiver of dual representation executed in the trial court (Petitioner's Brief at pp. 11-12). The Opinion of the Supreme Court of Kentucky does not address this particular issue since petitioner failed to raise it in his state court appeal. (Petitioner's Appendix at pp. 1a-6a). This Court therefore lacks jurisdiction to consider the waiver of dual representation argument since it was never presented by him to the Supreme Court of Kentucky. 28 U.S.C. §1257(3); Rule of the Supreme Court of the United States 21.1(h).

The state courts properly allowed the Thompsons' out-of-court statements to be used since petitioner himself was the cause of the Thompsons' silence. The writ should be denied.

II.

THE TRIAL COURT'S APPLICATION OF KRS 29A.040, PROVIDING THAT A LIST OF REGISTERED VOTERS SHALL BE USED OR INCLUDED IN THE JURY POOL, DID NOT CONSTITUTE A DENIAL OF PETITIONER'S RIGHT TO A JURY DRAWN FROM A SOURCE FAIRLY REPRESENTATIVE OF THE COMMUNITY.

Kentucky Revised Statute 29A.040 provides that all voter registration lists shall constitute a master list of prospective jurors. Petitioner argues that the statute denied his federal constitutional right to a jury drawn from a source fairly representative of the community. His argument is without merit.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant a trial "by an impartial jury of the state and district wherein the crime shall have been committed." The amendment has been interpreted to

guarantee a criminal defendant a jury "drawn from a source fairly representative of the community." Taylor v. Louisiana, 419 U.S. 522 (1975).

To establish a prima facie violation of the "fair cross-section" requirement, the petitioner must show (1) that the group alleged to be excluded is a "cognizable" or "distinctive" group within the community; (2) that the representation of this group is not fair and reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation is inherent in the system used to select the jury pools or venires. Duren v. Missouri, 439 U.S. 357, 364 (1979).

Petitioner apparently contends that voter registration lists are per se a constitutionally inadequate source of

jurors since those not registered to vote would not be summoned for jury service. Petitioner has utterly failed to make a prima facie showing or otherwise demonstrate that the Commonwealth's use of voter registration lists has resulted in the systematic exclusion of a cognizable group from the jury pool. In the absence of a prima facie showing by petitioner that the use of the voter registration lists resulted in the systematic exclusion of a cognizable group or class of qualified citizens the use of such lists by the Commonwealth is constitutionally permissible.

The petition should be denied.

CONCLUSION

For the foregoing reasons the respondent submits that the Petition for a Writ of Certiorari to the Supreme Court of Kentucky should be denied. Review by this Honorable Court is clearly not warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rickie L. Pearson, counsel for the respondent, hereby certify that three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari was served by mailing true copies thereof to Hon. William Edward Hartlage, Fulton Hubbard & Hubbard, 117 East Stephen Foster Avenue, Bardstown, Kentucky 40004-0088, counsel for petitioner, this 15th day of January, 1988.

Rickie L. Pearson